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In the Supreme Court of the United States

OCTOBER TERM, 1982

MELVIN E. TUTEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a prior conviction for which petitioner was sentenced under the Federal Youth Corrections Act, 18 U.S.C. 5005 *et seq.*, and from which he was not unconditionally discharged prior to the expiration of the entire period of probation fixed by the court, can serve as the basis for a subsequent felony recidivist sentence.

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OPINION BELOW

The opinion of the District of Columbia Court of Appeals (J.A. 19-26) is reported at 440 A.2d 1008.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1982, and a petition for rehearing was denied on March 30, 1982 (J.A. 27). The petition for a writ of certiorari was filed on May 20, 1982, and was granted on October 12, 1982 (J.A. 28). The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

STATUTE INVOLVED

18 U.S.C. 5021(b) provides:

> Where a youth offender has been placed on probation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set

aside the conviction, and the court shall issue to the youth offender a certificate to that effect.

STATEMENT

1. The Federal Youth Corrections Act of 1950, 18 U.S.C. 5005 *et seq.* (the "YCA" or the "Act"), was designed as a comprehensive sentencing scheme "to provide a better method for treating young offenders convicted in federal courts * * *, to rehabilitate them and restore normal behavior patterns." *Dorszynski* v. *United States*, 418 U.S. 424, 433 (1974). The Act makes available to federal district courts four options in sentencing youth offenders—that is, persons under the age of 22 years at the time of conviction (18 U.S.C. 5006(d)).[1] First, if the court is of the opinion that a youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the offender on probation. 18 U.S.C. 5010(a). The Act also offers two treatment alternatives.[2] Under 18 U.S.C. 5010(b) and 5017(c), the judge may sentence the defendant to the custody of the Attorney General for treatment and supervision of indeterminate duration up to six years, the defendant being entitled to conditional

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[1] "Young adult" offenders, who have attained their 22nd birthday but have not yet reached their 26th birthday at the time of conviction, also may be sentenced under the YCA if "the court finds that there are reasonable grounds to believe that the defendant will benefit from the treatment provided under the [Act]" (18 U.S.C. 4216). The Act ordinarily is not applied to convicted persons under the age of 18, since they are eligible for sentencing under the Federal Juvenile Delinquency Act, 18 U.S.C. 5031 *et seq.* As noted below (note 25, *infra*), notwithstanding their qualifying age, certain multiple offenders in the District of Columbia also are ineligible for sentencing under the Act. See D.C. Code § 22-3202(d)(1).

[2] The Act defines "treatment" as "corrective and preventive guidance and training designed to protect the public by correcting antisocial tendencies of youth offenders." 18 U.S.C. 5006(f).

release under supervision after no more than four years and to unconditional discharge at the end of six years. Alternatively, under Sections 5010(c) and 5017(d), a judge who is of the view that the defendant "may not be able to derive maximum benefit from treatment" within six years after conviction may sentence the defendant to treatment for any longer period authorized by law for the offense in question. The defendant then is entitled to conditional release two years prior to the expiration of the term imposed and to unconditional discharge at the end of that term. Under either treatment alternative, the Parole Commission may conditionally release a defendant "at any time" (18 U.S.C. 5017(a)), and may unconditionally discharge the defendant one year after conditional release (18 U.S.C. 5017(b)). Finally, if the court finds that a youth offender will not derive benefit from treatment under the Act, it may sentence him "under any other applicable penalty provision" (18 U.S.C. 5010(d)).[3]

Another key feature of the Act, which this Court has described as "[a] powerful tool" (*Dorszynski* v. *United States*, *supra*, 418 U.S. at 435), is the automatic set-aside provision. Section 5021(a) provides:

> Upon the unconditional discharge by the Commission of a committed youth offender before the expiration of the maximum sentence imposed upon him, the conviction shall be automatically set aside and the Commission shall issue to the youth offender a certificate to that effect.

In 1961, Section 5021(b), the provision directly at issue in this case, was added in order to extend the benefit of the set-aside feature to youth offenders sentenced to

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[3] A judge who sentences a youthful offender under 18 U.S.C. 5010(d) must make an explicit finding on the record that the offender would not benefit from treatment under the Act. See *Dorszynski* v. *United States*, *supra*.

probation under Section 5010(a). Pub. L. No. 87-336, 75 Stat. 750. Section 5021(b) provides:

> Where a youth offender has been placed on probation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set aside the conviction, and the court shall issue to the youth offender a certificate to that effect.

2. On February 12, 1971, petitioner was convicted on his plea of guilty to the charge of carrying a pistol without a license, in violation of D.C. Code § 22-3204. Petitioner, who was then 19 years old, was sentenced under the YCA to two years' probation. See 18 U.S.C. 5010(a). Petitioner was unconditionally discharged at the end of the two years. He received no certificate setting aside his conviction under Section 5021. Pet. Br. 7, 1a; J.A. 20.

The present case arises out of petitioner's subsequent violation of the same D.C. Code provision on November 23, 1979. Following a jury trial in the Superior Court of the District of Columbia, petitioner was again convicted of carrying a pistol without a license.[4] Pursuant to D.C. Code § 23-111, the prosecutor informed the trial court of petitioner's previous conviction, which subjected petitioner to the enhanced penalty provided by D.C. Code § 22-3204.[5] Based on the earlier conviction, petitioner

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[4] The jury acquitted petitioner on a charge of assault with a dangerous weapon. J.A. 3.

[5] D.C. Code § 22-3204 provides:

> No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section

was sentenced as a felon rather than as a misdemeanant. He received a sentence of from two to six years' imprisonment. J.A. 3, 5, 15, 20.

Petitioner appealed to the District of Columbia Court of Appeals, claiming that his mere completion of, and unconditional discharge from, the two-year probationary sentence entitled him to an automatic set-aside of the YCA conviction, which therefore could not provide the basis for a subsequent recidivist penalty. The court of appeals rejected this contention, concluding instead that the plain language of Section 5021(b) limits the benefits of the automatic set-aside provision to those youth offenders whom a court, in its discretion, chooses to discharge *prior to* expiration of the sentence originally imposed upon them (J.A. 21).[6] The court found additional support for its reading of the statute in the legislative history (J.A. 21-25), and characterized *United States* v. *Arrington*, 618 F.2d 1119 (5th Cir. 1980), cert. denied, 449 U.S. 1086 (1981), on which petitioner relied, as based "on unpersuasive authority" (J.A. 21). The court accordingly held (J.A. 26) that petitioner was not entitled to a set-aside of his YCA conviction, and that therefore that conviction provided a proper basis for the subsequent recidivist penalty.

22-3215 [by a fine of not more than $1,000, or imprisonment for not more than one year, or both], unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years.

[6] The court held (J.A. 21): "The language of the statute indicates that convictions are to be set aside only when (1) a youth offender has been given a probationary sentence, (2) a court, in its discretion, decides to discharge him from probation before the term of his probationary sentence has expired, and (3) the discharge is [un]conditional."

SUMMARY OF ARGUMENT

A

The plain language, legislative history and consistent administrative construction of Section 5021 all demonstrate the lack of merit to petitioner's claim that he was entitled to a set-aside of his YCA conviction upon his completion of the probationary term imposed on him.

1. The statutory language could not be clearer, and it leaves no room for the construction urged by petitioner. Section 5021(b) unambiguously provides that a youth offender who is placed on probation shall have his YCA conviction automatically set aside if the sentencing court, "in its discretion, unconditionally discharge[s] such youth offender from probation *prior to the expiration of the maximum period of probation theretofore fixed by the court*" (emphasis added). Petitioner's claim that Section 5021(b) mandates an automatic set-aside of a YCA conviction whenever a youth offender completes the term of probation imposed on him thus runs afoul of the plain language of the statute, which unequivocally restricts the availability of set-aside relief to those YCA probationers who are unconditionally released *before* the expiration of the probationary term imposed on them.

Both this Court and the vast majority of the lower federal courts that have considered the question have recognized that a YCA conviction will be set aside only when a court (or the Parole Commission) has discharged the youth offender before the expiration of his sentence, whether of probation or incarceration. The only court of appeals decision to the contrary is *United States* v. *Arrington*, 618 F.2d 1119 (1980), cert. denied, 449 U.S. 1086 (1981), in which the Fifth Circuit held that every committed youth offender is entitled, upon his eventual unconditional discharge, to a set-aside of his conviction under 18 U.S.C. 5021(a). It is quite evi-

dent from inspection of the opinion in *Arrington* that the court simply misread the statute, overlooking the phrase "before the expiration of the maximum sentence imposed upon him," which language is nowhere discussed or explained in the opinion.

2. We view the plain language of Section 5021 as so unambiguous as to suggest that "further inquiry may be unnecessary" (*Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 201 (1976)). In any event, examination of the legislative history strongly reinforces the plain language of the statute.

The set-aside provision that was contained in the YCA as enacted in 1950 made such relief available only to committed youth offenders. Nevertheless, the history of that provision is enlightening, particularly in view of the similarity between its language and that of the subsequently enacted Section 5021(b), and because of Congress' intent in Section 5021(b) to extend to probationers the same set-aside relief that the original Act afforded committed youth offenders.

The clear import of each of the draft provisions of what became Section 5021(a) was that a youth offender would be granted set-aside relief only if he were unconditionally discharged prior to the expiration of whatever sentence had been imposed on him. The Act's authors explained that they intended the set-aside to operate in favor of only those youth offenders who were discharged early, as a reward for their exemplary behavior during treatment. The intent to make the set-aside benefit selective in nature, offered as a reward for good behavior, was reiterated in the legislative history of Section 5021(b) itself. This rehabilitative purpose, however, would be thwarted by the construction of the statute that the *Arrington* court adopted and that petitioner urges.

3. Ever since the enactment of the YCA in 1950, the Board of Parole and the United States Parole Commis-

sion have consistently construed 18 U.S.C. 5021(a) as entitling only those committed youth offenders who are unconditionally discharged prior to the expiration of the sentence imposed on them to set-aside of their convictions. Similarly, since the addition of Section 5021(b) in 1961, the Administrative Office of the United States Courts in its instruction manual for probation officers has interpreted that provision as making set-aside relief available only to those YCA probationers who are unconditionally discharged prior to the expiration of the probationary term imposed on them. This consistent construction of the Act by the agencies charged with its administration is entitled to substantial deference.

B

Petitioner alternatively claims that even if he is not entitled to have his YCA conviction set aside, it nevertheless cannot be used as the basis for a subsequent recidivist penalty because to permit YCA convictions to be used for that purpose would violate the policy underlying both the YCA and recidivist statutes. This contention is baseless.

1. There is nothing in either the language or the legislative history of the YCA that suggests that a conviction thereunder that is not set aside under Section 5021 may not be used as the basis for a subsequent recidivist penalty. Nor is any policy of the Act violated by such use. Once an offender has failed to respond to the special treatment and supervision afforded by the YCA program, as evidenced by his return to crime, no purpose of the YCA would be served by exempting him from harsher penalties simply because he once appeared to be a candidate for successful rehabilitation.

2. Similarly, the sweeping language of D.C. Code § 22-3204's recidivist penalty provision conclusively rebuts the suggestion that it was not intended to be triggered by a YCA conviction. Moreover, the legislative debate on the District of Columbia Law Enforcement

Act of 1953, ch. 159, 67 Stat. 90 *et seq.*, which added the enhanced penalty provision to D.C. Code § 22-3204, focused specifically on the relationship between the proposed legislation and the YCA. The fact that the Congress that enacted the recidivist penalty feature of D.C. Code § 22-3204 was well aware of the existence of the YCA and the implications it could have for sentencing procedures in the District of Columbia, but nevertheless did not exclude YCA convictions from the category of convictions that could trigger the recidivist penalty, confirms the apparent broad sweep of the statutory language. Petitioner thus was correctly sentenced under the enhanced penalty provision of Section 22-3204 on the basis of his prior YCA conviction.

ARGUMENT

ABSENT AN EARLY DISCHARGE FROM THE TERM OF PROBATION IMPOSED ON HIM, PETITIONER WAS NOT ENTITLED TO HAVE HIS YCA CONVICTION SET ASIDE UNDER 18 U.S.C. 5021(b), AND THAT CONVICTION THEREFORE PROVIDED A VALID BASIS FOR PETITIONER'S SUBSEQUENT RECIDIVIST SENTENCE

A. A SET-ASIDE OF A YCA CONVICTION UNDER SECTION 5021 IS AVAILABLE ONLY TO THOSE YOUTH OFFENDERS WHO ARE UNCONDITIONALLY DISCHARGED PRIOR TO THE EXPIRATION OF THE SENTENCE IMPOSED ON THEM

The construction of Section 5021(b) adopted by the court below is compelled by the clear wording of the statute. The interpretation urged by petitioner—that the benefit of Section 5021(b)'s set-aside was intended to inure to anyone who completes his YCA term of probation and is unconditionally discharged at the end of it—can be adopted only by ignoring the plain language of the Act, as well as Congress' clear intent in enacting the statute. Both this Court and the great majority of the lower federal courts have recognized what we sub-

mit is the unambiguous import of the statutory language—that a set-aside of a YCA conviction under Section 5021 is available to only those youth offenders who are unconditionally discharged *prior to* the expiration of the sentence imposed on them.

1. The Language Of 18 U.S.C. 5021(a) And (b) Unambiguously Bars Petitioner's Claim

a. As this Court has frequently noted:

> In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of "a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive."

United States v. *Turkette*, 452 U.S. 576, 580 (1981) (citation omitted). See also, e.g., *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Lewis* v. *United States*, 445 U.S. 55, 60 (1980).

In this case, the pertinent statutory language could not be clearer. Section 5021(b) unambiguously provides that a youth offender who is placed on probation shall have his YCA conviction automatically set aside if the sentencing court, "in its discretion, unconditionally discharge[s] such youth offender from probation *prior to the expiration of the maximum period of probation theretofore fixed by the court.*" 18 U.S.C. 5021(b) (emphasis added). Analogously, Section 5021(a), which applies to "committed youth offenders,"[7] provides for the automatic set-aside of a YCA conviction only when the defendant is unconditionally discharged "before the expiration of the maximum sentence imposed upon him." The wording of the statute itself thus compels the

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[7] A committed youth offender "is one committed for treatment [under the Act] to the custody of the Attorney General pursuant to sections 5010(b) and 5010(c) of [the Act]." 18 U.S.C. 5006(e).

conclusion that a YCA conviction will be set aside only when a court (or the Parole Commission) has discharged the youth offender *before* the expiration of his sentence, whether of probation or incarceration.

As the court of appeals observed (J.A. 21), petitioner's claim that Section 5021(b) mandates an automatic set-aside of a YCA conviction whenever a youth offender completes the term of probation imposed on him simply ignores the phrase "prior to the expiration of the maximum period of probation theretofore fixed by the court."[8] The same defect is evident in the opinion of the Fifth Circuit in *United States* v. *Arrington*, 618 F.2d 1119 (1980), cert. denied, 449 U.S. 1086 (1981), the only appellate case supporting petitioner's position. While that opinion asserts (618 F.2d at 1124) that "the clear statutory language command[s]" the result that every YCA conviction be automatically set aside upon completion of the sentence, it nowhere discusses or explains the statutory phrase "prior to the expiration of the maximum sentence imposed." Neither the *Arrington* court nor petitioner has profferred any suggestion, plausible or otherwise, as to what meaning other than the obvious one could be ascribed to that language.

Had Congress intended that the mere completion of a probationary sentence would entitle a youth offender to a set-aside of his conviction, it would have been a simple matter to have so provided. Indeed, Congress included just such a provision in 21 U.S.C. 844(b), which provides that a first offender found guilty of simple possession of a controlled substance may be placed on probation without entry of judgment and that "[i]f during the period of his probation such person does not violate

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[8] Such a construction violates the fundamental rule of statutory construction that effect should be given "to every word Congress used." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979); see also *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979); *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955).

any of the conditions of the probation, then upon expiration of such period the court shall discharge such person and dismiss the proceedings against him" (21 U.S.C. 844(b)(1)). Congress' use, in Section 5021(b), of the very different phrase "prior to the expiration of the maximum period of probation theretofore fixed by the court" thus establishes conclusively its intent that the set-aside provision would inure to the benefit only of those youth offenders whom the sentencing court deemed deserving of an *early* unconditional discharge from probation.[9]

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[9] It is undisputed in this case that petitioner served the full two-year term of probation imposed upon him, and that the sentencing court took no action to grant him an early discharge. See Pet. Br. 7. Thus, it is clear that the conditions for a set-aside required by the plain language of the statute were not satisfied here.

Petitioner complains (Br. 7-8 & n.6, 12 n.8), however, that the usual procedures followed by the District of Columbia Superior Court Department of Probation were not complied with in his case. In cases involving youth offenders sentenced to probation under 18 U.S.C. 5010(a), those procedures require the supervising probation officer to prepare a memorandum for the sentencing judge no later than 30 days before the end of the youth offender's term of probation, describing the offender's progress and adjustment in the community. The purpose of the memorandum is to bring to the judge's attention the possibility of granting the offender an early discharge and to provide the judge with the information needed to make an informed decision. Pet. Br. 2a. Petitioner suggests (Br. 8 n.6) that the failure of probation officers to submit his case to the court, and the subsequent failure of the court to exercise its discretion, is itself "sufficient reason for reversing the decision below."

The Act, however, does not prescribe any particular procedures that must be followed in making the early discharge decision. Moreover, the questions whether the Probation Department complied with its own regulations and the effect of any noncompliance are not properly before this Court, since they were neither presented to nor addressed by the court below. See *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977); *Lawn* v. *United States*, 355 U.S. 339, 362-363 n.16 (1958). Nor

b. Although this Court has not previously been directly presented with the question raised by this case, it has had the occasion, in related contexts, to note what we submit is the obvious and only possible construction of Section 5021—that its automatic set-aside provisions are available only to youth offenders who are unconditionally discharged *prior to* the expiration of the sentence imposed on them. In *Dorszynski* v. *United States*, 418 U.S. 424 (1974), the Court held that, prior to sentencing a youth offender as an adult under 18 U.S.C. 5010(d), a district court is required to make an express finding on the record that the defendant would not benefit from treatment under the YCA. 418 U.S. at 443-444.[10] Because no such finding had been made in that case, the Court in *Dorszynski* reversed and remanded for further proceedings, noting (418 U.S. at 430 n.6; emphasis added) that even if the defendant

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are they fairly included in the question presented in the petition for a writ of certiorari. See Sup. Ct. R. 21.1(a). We note, however, that it is possible that petitioner could move the court that sentenced him under the YCA to exercise its discretion nunc pro tunc to grant him an early unconditional discharge from probation and a set-aside of his conviction. See *United States* v. *Fryer*, 545 F.2d 11, 13 n.3 (6th Cir. 1976). If petitioner were successful in that endeavor he could then seek a reduction of sentence from the second sentencing court under D.C. Super. Ct. Crim. R. 35(a). But see note 23, *infra*. We further note that the procedures adopted by the District of Columbia Department of Probation on which petitioner relies reveal an administrative construction of Section 5021(b) that coincides precisely with the decision below. See also pages 26-30, *infra*.

Finally, to the extent petitioner is arguing (Br. 12 n.8) that an early unconditional discharge should not be a condition precedent to set-aside relief because the possibility of discharging a particular youth offender prior to the expiration of his probationary term may escape the attention of the sentencing court, that argument is properly addressed to Congress, not to this Court.

[10] The Court declined, however, to require the sentencing court to supply reviewable reasons supporting the "no benefit" finding. See 418 U.S. at 441-442.

already had served all of his adult sentence, including probation, he nevertheless could take advantage of the set-aside provision of the Act if he were resentenced thereunder *and if he obtained the early discharge required by 18 U.S.C. 5021:*

> To be eligible to have his conviction set aside under the Act, petitioner would have to be committed under § 5010(b) or (c), or placed on probation under § 5010(a), *and achieve the early discharge required by § 5021(a) or (b).* While this might require the imposition of a longer sentence than he originally received, petitioner represents through counsel that he would voluntarily seek resentencing which would place him back on probation. * * * The District Court would then be able, as a matter of discretion, to provide the requisite early unconditional discharge. 18 U.S.C. § 5021(b).

See also 418 U.S. at 435 ("[a] powerful tool available to the [Parole Commission] was its discretion to discharge committed persons unconditionally before it was required to do so, for upon such discharge the conviction upon which the sentence rested would be automatically set aside. 18 U.S.C. § 5021(a). * * * Similarly, if the sentencing judge chose the second alternative created by the Act, *i.e.*, placement of the youth offender on probation under its provisions, the judge himself could exercise his discretion to discharge the offender from probation unconditionally. 18 U.S.C. § 5021(b). * * * This, too, would result in the automatic setting aside of the offender's conviction. 18 U.S.C. § 5021(b)").

The Court also recognized that an early unconditional discharge is a prerequisite for the automatic set-aside relief afforded by Section 5021 in *Durst* v. *United States*, 434 U.S. 542 (1978). There, the Court held that a trial judge who suspends a sentence of commitment and places a youth offender on probation, pursuant to 18 U.S.C. 5010(a), may impose a fine, require restitution, or both as conditions of probation. In so holding, the Court again observed (434 U.S. at 548; emphasis added):

> A particularly valuable benefit for the offender sentenced under the YCA is the prospect of obtaining a certificate setting aside his conviction. A certificate automatically issues when a youth committed to the custody of the Attorney General under § 5010(b) or § 5010(c) is unconditionally released *prior to expiration of the maximum sentence imposed.* 18 U.S.C. § 5021(a) (1976 ed.). In 1961, the YCA was amended to extend the benefit of a certificate to youths sentenced to probation under § 5010(a) when the court unconditionally discharges the youth *prior to expiration of the sentence of probation imposed.* Act of Oct. 3, 1961, Pub. L. No. 87-336, 75 Stat. 750 (codified at 18 U.S.C. § 5021(b) (1976 ed.)).

The majority of the lower federal courts likewise have consistently recognized that a youth offender is entitled to a set-aside of his conviction only when he has been released from probation or incarceration ahead of schedule. *Preston* v. *McCall*, 542 F. Supp. 249, 251 (E.D.N.C.), aff'd, 688 F.2d 834 (4th Cir. 1982) (table); *Watts* v. *Hadden*, 651 F.2d 1354, 1379 (10th Cir. 1981); *Doe* v. *Webster*, 606 F.2d 1226, 1236-1237 (D.C. Cir. 1979); *Cox* v. *United States*, 473 F.2d 334, 336 (4th Cir.) (en banc), cert. denied, 414 U.S. 869 (1973); *Cunningham* v. *United States*, 461 F.2d 995, 996 (9th Cir. 1972); *United States* v. *Bronson*, 449 F.2d 302, 305 (10th Cir. 1971), cert. denied, 405 U.S. 949 (1972); *Nash* v. *United States*, 415 F.2d 338, 340 (10th Cir. 1969); *Tatum* v. *United States*, 310 F.2d 854, 855-856 (D.C. Cir. 1962).

The only court of appeals decision to the contrary is *United States* v. *Arrington*, *supra*, on which petitioner relies heavily (Br. 11, 20-22).[11] In that case, the court

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[11] Petitioner also relies (Br. 22-23 & n.18) on two district court decisions, *United States* v. *Sinkfield*, 484 F. Supp. 595 (N.D. Ga. 1980), and *United States* v. *Villar*, 416 F. Supp. 887 (S.D.N.Y. 1976). In neither case, however, did any extended discussion or citation of authority accompany the court's brief

held that a youth offender sentenced under Section 5010(b) was entitled to an automatic set-aside of his conviction pursuant to Section 5021(a) upon his unconditional discharge at the end of six years.[12] As noted above (page 11, *supra*), in focusing solely on the unconditional discharge of a youth offender at the completion of his sentence, the Fifth Circuit neither adverted to nor explained the language limiting the setting aside of a YCA conviction to individuals released prior to expiration of their maximum sentence. Since *Arrington* failed to come to grips with the critical statutory language upon which this case turns, it has no persuasive force.

The *Arrington* court also invoked what it considered to be "the policy underlying the Youth Correction Act." 618 F.2d at 1124. But, as we show below, the legislative history bolsters the clear import of the statutory language that Congress intended that only those youth offenders unconditionally discharged prior to the expiration of the sentence, whether of incarceration or of probation, actually imposed on them would be entitled to the set-aside relief provided by 18 U.S.C. 5021.

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dictum. 484 F. Supp. at 598; 416 F. Supp. at 889. Moreover, the remarks in *Sinkfield* on which petitioner relies (Br. 23) may be attributable to the fact that in that case the court was granting a motion for reduction of sentence under Fed. R. Crim. P. 35. While we believe the court would have been mistaken, it may well have thought that its action in reducing the defendant's sentence satisfied Section 5021's early discharge requirement.

[12] The Fifth Circuit further held that the set aside conviction could not provide the basis for a conviction for possession of firearms by a convicted felon under 18 U.S.C. App. 1202(a)(1), and accordingly reversed Arrington's conviction on six counts charging violations of that statute. 618 F.2d at 1124-1125. However, the court upheld Arrington's convictions on two other firearms counts, which did not require a prior conviction as a predicate. *Id.* at 1127. Because only Arrington sought this Court's review of the Fifth Circuit's decision, the question presented by this case was not raised in the petition for a writ of certiorari in *Arrington*.

2. The Legislative History Confirms The Plain Meaning Of The Statutory Language

In view of the unambiguous statutory language, it is perhaps not surprising that petitioner has neglected even to address the wording of Section 5021,[13] but rather attempts to rely (Br. 14-20) on the legislative history and "policy" arguments derived from it. Nevertheless, "[w]hen the terms of a statute are unambiguous, [this Court's] inquiry comes to an end, except 'in "rare and exceptional circumstances."'" *Howe* v. *Smith*, 452 U.S. 473, 483 (1981) (citations omitted). No such rare and exceptional circumstances are present here; to the contrary, the legislative history of Section 5021 strongly reinforces the plain language of the statute.

a. The Act was the outgrowth of the efforts of a committee of federal judges appointed by Chief Justice Stone under the auspices of the Judicial Conference to study the general subject of punishment for crime, including the treatment of youthful offenders. In 1942, the Committee issued a report to the Conference that contained a draft of an act to provide a correctional system for both adult and youth offenders. The proposals regarding youth offenders were largely adopted by Congress in 1949 in the bill that became the YCA. See *Durst* v. *United States*, *supra*, 434 U.S. at 544; *Dorszynski* v. *United States*, *supra*, 418 U.S. at 432 & n.8, 437. In particular, the report contained a predecessor provision to Section 5021(a) that reveals the same import as the language in the Act as eventually passed:

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[13] Indeed, in the petition for a writ of certiorari (at 7) petitioner acknowledged that "the language of section 5021(a) would appear to limit the benefits of set-aside to those youthful offenders unconditionally released prior to the expiration of the maximum sentence imposed upon them * * *." If anything, the language of subsection (b) is even clearer.

> Upon the unconditional discharge by the Authority of a youth offender before the expiration of six years from the date of his conviction, where an original sentence was not imposed on such youth offender, and upon the unconditional discharge by the Authority of a youth offender upon whom an original sentence was imposed, before the expiration of the original sentence, the conviction shall be automatically set aside and held for naught, and the Authority shall issue to the youth offender a certificate to that effect.

Report to the Judicial Conference of the Committee on Punishment for Crime 19-20 (1942) (Draft of an Act Recommended by the Committee to Provide a Correctional System for Adult and Youth Offenders Convicted in Courts of the United States, Title III, Sec. 13).

Hearings were held on the Committee's proposal in 1943[14] and again in 1949. Although the set-aside provisions contained in the two Senate bills on which the 1949 hearings were held varied slightly to reflect the different sentencing options made available by the two bills (see *Correctional System for Youth Offenders: Hearings on S. 1114 and S. 2609 Before a Subcomm. of the Senate Comm. on the Judiciary*, 81st Cong., 1st Sess. 2 (S. 1114, Sec. 5013), 5-6 (S. 2609, Sec. 5010) (1949) ("Hearings")), the language of the provision remained clear in requiring that a set-aside would be granted only if the youth offender were discharged before the expiration of whatever maximum term had been imposed on him. Thus, Section 5025 of S. 1114, 81st Cong., 1st Sess. (1949), which provided for commitment under the Act only for the six-year indetermi-

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[14] *Federal Corrections Act: Hearing on S. 895 Before a Subcomm. of the Senate Comm. on the Judiciary*, 78th Cong., 1st Sess. (1943); *Federal Corrections Act and Improvement in Parole: Hearings Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 78th Cong., 1st Sess. (1943).

nate term now contained in Sections 5010(b) and 5017(c), provided:

> Upon the unconditional discharge by the Board of a youth offender before the expiration of six years from the date of his conviction, the conviction shall be automatically set aside and the Board shall issue to the youth offender a certificate to that effect * * *.

Hearings, *supra*, at 4. Section 5021 of S. 2609, 81st Cong., 1st Sess. (1949), the bill actually passed, was phrased slightly differently, reflecting the fact that that proposal made available two types of sentences of commitment under the Act—the six year indeterminate sentence or any longer term authorized by law for the offense in question (Hearings, *supra*, at 7):

> Upon the unconditional discharge by the Division of a committed youth offender before the expiration of the maximum sentence imposed upon him, the conviction shall be automatically set aside and the Division shall issue to the youth offender a certificate to that effect * * *.[15]

Comments made by the Act's authors during the 1949 hearings confirm that they intended the set-aside provision to operate in favor of only those youth offenders who were discharged prior to the expiration of the sentence imposed on them, as a reward for exemplary behavior, and not for every youth offender who merely completed his term. For example, Chief Judge Bolitha J. Laws of the United States District Court for the District of Columbia, a member of the Judicial Conference

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[15] The set-aside provision contained in each of these bills concluded with the statement that the certificate issued to the youth offender "shall have the same legal effect as a pardon." Hearings, *supra*, at 4, 7. This language was later stricken from S. 2609 by means of a technical amendment, without debate. 96 Cong. Rec. 8267 (1950); Hearings, *supra*, at 71.

Committee that had originally proposed the Act,[16] commented on the set-aside provision (Hearings, *supra*, at 14; emphasis added):

> Committed youth offenders who *earn* their final discharge *before the end of their maximum term* have their records cleared and all their civil rights restored.

He later reiterated (*id.* at 19; emphasis added):

> Eventually, if he is ready to emerge as a rehabilitated citizen, there are no impediments to release. When the Division turns them out *ahead of their maximum sentence*, this law blots out their sentence and lets them go without any stigma on their life * * *.

Judge John J. Parker of the United States Court of Appeals for the Fourth Circuit, another member of the original committee, expressed the same idea (*id.* at 45):

> [T]here is one feature in this bill which is very salutary and that is that if the youth offender is reclaimed in the opinion of the Board and they decide to release him, they can strike out the sentence imposed upon him and completely set aside his conviction * * *.

The Senate Report similarly explains Section 5021 as follows (S. Rep. No. 1180, 81st Cong., 1st Sess. 2 (1949)):

> If [the youthful offender] has responded to treatment and the Youth Division is of the opinion that his rehabilitation has been accomplished, the youth offender may be discharged unconditionally before the full maximum term has expired, in which event the conviction shall be automatically set outside [sic] and the Division shall issue to the youth offender a certificate to that effect.

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[16] As this Court noted in *Dorszynski* v. *United States*, *supra*, 418 U.S. at 437, the views of the judges who helped draft the Act are "of particular importance."

See also *id.* at 11; H.R. Rep. No. 2979, 81st Cong., 2d Sess. 9 (1950).

To be sure, the foregoing history of Section 5021(a) "is not determinative on the specific question posed by this case" (Br. 17), that is, the meaning of Section 5021(b), which was not added until 11 years later. Nevertheless, it is quite illuminating, particularly in view of the similarity between the language employed in the two provisions and the express intent (see page 22, *infra*) of the Congress that added Section 5021(b) to extend the same set-aside benefit to probationers as the original Act already afforded committed youth offenders.

Moreover, petitioner errs in contending (Br. 16-17) that Congress' intent in the original Section 5021, to reward with a set-aside committed youth offenders who were discharged before the expiration of six years or of a greater adult-length sentence, supports his right to a set-aside because he was unconditionally discharged from probation after only two years. As the legislative history described above makes clear, the reason committed youth offenders were given a set-aside under those circumstances was because the six-year or greater adult-length sentence was the sentence *actually imposed on them.*[17] Petitioner's suggestion thus ignores the clear import of the set-aside provision, which focuses not on whether the length of time served amounts to less than the statutory maximum, but rather on whether the offender, because of exemplary behavior, is discharged before the expiration of whatever sentence was imposed on him. Hence, to the extent that the language and history of Section 5021(a) are instructive with respect to the meaning of the subsequently added Section 5021(b), they support the court

[17] The six-year indeterminate sentence is the only sentence that a court can impose on a youth offender under Section 5010(b).

of appeals' construction that, regardless of the length of the probationary term imposed, the youth offender must receive his discharge *before* the end of that time in order to earn a set-aside.

b. In 1961, the YCA was amended to add the specific set-aside provision that is at issue here, 18 U.S.C. 5021(b):

> Where a youth offender has been placed on probation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation *prior to the expiration of the maximum period of probation theretofore fixed by the court*, which discharge shall automatically set aside the conviction, and the court shall issue to the youth offender a certificate to that effect.

Pub. L. No. 87-336, 75 Stat. 750 (emphasis added). The stated purpose of the amendment was to correct an inconsistency in the Act by extending the same set-aside benefit to probationers as was already available to committed youth offenders. H.R. Rep. No. 433, 87th Cong., 1st Sess. 1 (1961); S. Rep. No. 1048, 87th Cong., 1st Sess. 1 (1961). That Congress intended the set-aside provision to extend only to probationers who were unconditionally discharged prior to the expiration of the probationary term imposed on them thus is apparent from the Committees' description of the set-aside relief then available only to incarcerated youths: "The Federal Youth Corrections Act (18 U.S.C. 5021, *et seq.*) provides that upon the unconditional discharge of a committed youth offender *before the expiration* of *his* maximum sentence, the conviction shall automatically be set aside by the U.S. Board of Parole." H.R. Rep. No. 433, *supra*, at 1 (emphasis added); S. Rep. No. 1048, *supra*, at 1 (emphasis added).[18]

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[18] Petitioner attempts to rely (Br. 19) on language in the reports that describes Section 5021(a) as providing that "a youth offender who has been committed or incarcerated is entitled

This conclusion is bolstered by comments contained in two letters that were included in both reports. In a letter to the House Judiciary Committee Chairman, the Deputy Attorney General described the original provision and the amendment as follows (H.R. Rep. No. 433, *supra*, at 3 (emphasis added); S. Rep. No. 1048, *supra*, at 3 (emphasis added)):

> The Federal Youth Corrections Act (18 U.S.C. 5021 et seq.) provides that upon the unconditional discharge of a committed youth offender *before the expiration of his maximum sentence*, the conviction shall automatically be set aside and the Youth Division of the U.S. Board of Parole shall issue to the youth offender a certificate to that effect.
>
> This bill would add a new subsection to section 5021 to provide that upon the unconditional discharge of a youth offender *prior to the maximum expiration period of his probation fixed by the court*, his conviction shall be automatically set aside and the court shall issue a certificate to that effect.

The Judicial Conference likewise explained the original provision and the proposed amendment in a letter to the Speaker of the House (H.R. Rep. No. 433, *supra*, at 2 (emphasis added); S. Rep. No. 1048, *supra*, at 2 (emphasis added)):

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upon discharge to have his conviction set aside" and that explains that Section 5021(b) was intended to extend the same relief to YCA probationers. H.R. Rep. No. 433, *supra*, at 1; S. Rep. No. 1048, *supra*, at 1. From this, petitioner reasons (Br. 20) that any youth offender who serves his full sentence under the Act is entitled to a set-aside upon discharge. Petitioner's suggestion, however, flies in the face of the plain language of the two statutory provisions as well as the clearly expressed legislative intent underlying Section 5021(a) to use the possibility of securing a set-aside as an inducement to rehabilitation. Accordingly, the introductory description on which petitioner relies can have been intended only as a simplified and incomplete statement of the amendment's import.

> Under section 5021 as now written the "committed" youth offender is given a certificate by the Youth Correction Division that his conviction has been set aside, upon his unconditional discharge by the Division *before the expiration of the maximum sentence imposed upon him.* Under the proposed amendment the court would issue a similar certificate to the youth offender on probation when the court unconditionally discharges him from probation *prior to the maximum period of probation theretofore set by the court.*

Senator Dodd, the sponsor of Section 5021(b) (107 Cong. Rec. 8708 (1961)), gave a similar explanation of the original provision and the amendment to it on the floor of the Senate (*id.* at 8709) (emphasis added):

> The first of the two proposals [19] would amend the Youth Corrections Act to *make consistent* the treatment of the youth offenders on probation with that of youths committed to Federal institutions.
>
> Under section 5021 of title 18, a committed youth who is unconditionally discharged *before the expiration of the maximum sentence imposed upon him* automatically has his conviction set aside. No such provision exists for the youth who is released from probation. * * *
>
> I think section 5021 represents an important factor in the treatment of youthful offenders. *It provides an additional incentive for maintaining good behavior* by holding out to the youth an opportunity to clear his record.
>
> * * * * *
>
> The two amendments, when considered together, suggest the attitude of the Federal Government

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[19] Two amendments were being considered together; the second was an addition to the Juvenile Delinquency Act to make juvenile escapees liable to prosecution under the Escape Act, 18 U.S.C. 751. See 107 Cong. Rec. 8708-8709 (1961) (remarks of Sen. Dodd).

> to juvenile delinquency. *For those youths who demonstrate a willingness to help themselves*, every reasonable opportunity is afforded to assist them in making a new start.[20].

Once again, not only is the plain meaning of the statute confirmed, but the intent to make the set-aside benefit selective in nature, offered only as a reward for good behavior, is reiterated. This intent is entirely consistent with the overall rehabilitative purpose of the YCA, for the possibility of a set-aside is held out to the youth offender as a benefit he can earn if he takes full advantage of the treatment or supervision afforded him and rehabilitates and reintegrates himself into society. Obviously, then, the determination whether the benefits flowing from a set-aside should be afforded a particular youth offender can be made only during the course of his treatment or supervision. But the construction placed on Section 5021 by the Fifth Circuit in *Arrington* and by petitioner here thwarts this rehabilitative purpose.

Under the *Arrington* view—that a set-aside is available to every youth offender upon completion of his YCA sentence—the decision whether the youth offender will be afforded a set-aside of his conviction would

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[20] Without mentioning this unequivocal explanation by the sponsor of the bill, petitioner cites (Br. 6-7, 19-20), instead, an unintelligible remark made by Senator Dodd on the same occasion concerning the situation of a YCA probationer prior to the amendment under consideration. Senator Dodd had commented (107 Cong. Rec. 8709 (1961)) that without the amendment the conviction of a youth offender released from probation "remains on the record until the original sentence expires." But this observation was simply inaccurate, since it is plain that there was no set-aside provision of any sort in favor of probationers under the original Act. See, e.g., H.R. Rep. No. 433, *supra*, at 1; S. Rep. No. 1048, *supra*, at 1. Moreover, although petitioner cites this incomprehensible remark of Senator Dodd, he provides not even a hint of how it advances his position.

turn not at all on the quality of the youth offender's response to treatment, but solely on the initial decision to impose a YCA sentence rather than an adult sentence—a decision made at a time when it is impossible to tell whether the offender's subsequent behavior will demonstrate sufficient rehabilitation to merit set-aside relief. Petitioner, who was placed on YCA probation, has a more modest argument available, viz., that a YCA probationer's mere completion of and unconditional discharge from probation shows the kind of rehabilitation justifying a set-aside of the conviction, presumably because the sentencing court could have revoked the probation had the youth offender violated any of the probationary terms. That argument also must be rejected, however, as inconsistent with the language and policy of the Act. Congress' intent that a youth offender *earn* the set-aside of his conviction through his complete rehabilitation would not be satisfied by the mere negative of his avoiding the revocation of probation, but rather requires some positive behavior on behalf of the offender that warrants the *affirmative* action of *early* discharge from probation.

In sum, the history of both Sections 5021(a) and 5021(b) strongly reinforces the intent unambiguously evident from the statutory language: that only those youth offenders who are unconditionally discharged *prior to* the expiration of the sentence imposed on them are entitled to have their convictions set aside.

3. The Decision Below Coincides With The Construction Of Section 5021 That Has Consistently Been Placed On It By The Agencies Charged With Its Administration

"Although not determinative, the construction of a statute by those charged with its administration is entitled to great deference, particularly when that interpretation has been followed consistently over a long period of time." *United States* v. *Clark*, 454 U.S. 555, 565

(1982). See also *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). Here, the agencies responsible for administering Section 5021 have consistently construed it as affording set-aside relief only to those youth offenders who are unconditionally discharged prior to the expiration of the sentence imposed on them.

a. The original Act created within the Board of Parole a Youth Correction Division. Among the Division's responsibilities was the release of committed youth offenders conditionally under supervision, the unconditional discharge of such offenders, and the issuance to committed youth offenders of certificates reflecting the set-aside of their convictions, when appropriate. 64 Stat. 1086, 1088-1089. In 1976, the Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 219 *et seq.*, transferred the functions previously performed by the Parole Board, including its Youth Correction Division, to the United States Parole Commission. Both bodies have consistently construed Section 5021(a) as entitling only those committed youth offenders who are unconditionally discharged prior to the expiration of the sentences imposed on them to set-aside of their convictions.

As early as its first annual report, issued in 1954, the Parole Board described its procedures for the control and movement of committed youth offenders as including "[d]ischarge—unconditional upon expiration; *also unconditional prior to expiration with conviction set aside*" (*United States Board of Parole Annual Report 1954*, at 14; emphasis added). Moreover, since at least 1963, Department of Justice regulations have provided for an automatic set-aside "[w]hen an unconditional discharge has been granted to a youth offender *prior to*

the expiration of his maximum term of sentence * * *." 28 C.F.R. 2.44 (1963) (emphasis added).[21]

b. The courts administer the discharge of youth offenders from probation and the issuance of set-aside certificates to probationers under 18 U.S.C. 5021(b). Section 3656 charges the Director of the Administrative Office of the United States Courts with "promot[ing] the efficient administration of the probation system and the enforcement of the probation laws in all United States courts." Pursuant to this responsibility, the Administrative Office has, since 1949, published a Probation Officers Manual, which sets forth the practices and procedures governing the probation system.[22] The edition of the manual published in 1962, the year after Section 5021(b) was added to the YCA, explained that provision as follows:

> *DISCHARGES.* A. *Unconditional.* When a youth offender has been placed on probation, the court may "unconditionally discharge" him from proba-

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[21] The regulation continued in virtually the same form until 1976, when it was amended to provide:

> § 2.43 Early termination of parole.
>
> (a)(1) Upon its own motion or upon request of the parolee, the [Parole] Commission may terminate supervision, and thus jurisdiction, over a parolee prior to the expiration of his maximum sentence. A committed youth offender may be granted an early termination of jurisdiction (unconditional discharge) at any time after one year of continuous supervision on parole.
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> * * * * *
>
> (6) When termination of jurisdiction prior to the expiration of sentence is granted in the case of a youth offender, his conviction shall be automatically set aside. A certificate setting aside his conviction shall be issued in lieu of a certificate of termination.

The same language is currently set forth at 28 C.F.R. 2.43(a)(1), (a)(2).

[22] Any individual district court may, of course, modify or elaborate on the procedures established by the Administrative Office. See generally 18 U.S.C. 3651, 3654.

> tion *prior to the expiration of the maximum period of probation.* The discharge automatically sets aside the conviction and the court issues a certificate to that effect. * * *
>
> B. *Notifying FBI of Certificate of Vacation of Conviction.* When a youth offender on probation is discharged *prior to the maximum period of probation fixed by the court,* an FBI Disposition Sheet * * * should be sent to the Identification Division of the Federal Bureau of Investigation * * *.

Administrative Office of the United States Courts, [*1962*] *United States Probation Officers Manual* ¶ 9.43 (Nov. 1, 1962) (emphasis added). See also Administrative Office of the United States Courts, [*1978*] *Guide to Judiciary Policies and Procedures: Probation Manual* § 3202 (Nov. 1, 1978); Administrative Office of the United States Courts, [*1973*] *United States Probation System Operations Manual* ¶ 5.24B (July 2, 1973).

We noted above (note 9, *supra*) petitioner's claim that, contrary to established procedures of the District of Columbia Superior Court Probation Department, his case was not brought to the attention of the sentencing court 30 days prior to the expiration of his sentence so as to remind the court of the possibility of granting him an early unconditional discharge from probation and, hence, a set-aside of his conviction. The Administrative Office's 1973 and 1978 Probation Manuals contain a similar requirement (emphasis added):

> In the case of each youth offender or young adult offender probationer the probation officer shall make a report to the court not later than 90 days prior to the expiration of the period of probation fixed by the court. The report should evaluate the probationer's conduct and progress. *It should also remind the court that unconditional discharge from probation prior to expiration will automatically set aside the conviction (18 U.S.C. 5021(b)).*

1973 Manual, *supra*, at ¶ 4.10B; see also *1978 Manual*, *supra*, at § 5011.

As we observed above, the questions whether such procedures were complied with in petitioner's case and the effect of any noncompliance are not properly before this Court. Nevertheless, the existence of such procedures is one more example of the consistent administrative construction of Section 5021(b), which comports precisely with the decision below.

B. SENTENCING PETITIONER AS A RECIDIVIST UNDER D.C. CODE § 22-3204 ON THE BASIS OF HIS PRIOR YCA CONVICTION VIOLATES THE POLICY OF NEITHER THE YOUTH CORRECTIONS ACT NOR THE D.C. STATUTE

1. A YCA Conviction Is An Appropriate Basis For A Subsequent Recidivist Penalty

In the alternative, petitioner argues (Br. 12-14, 25-29) that even if his conviction need not be treated as set aside under Section 5021(b), it nevertheless cannot be used as the basis for a subsequent recidivist penalty because to allow YCA convictions to be so used violates the policy of that Act. This argument too lacks merit.

There is nothing in either the language or the legislative history of the YCA that even suggests that convictions thereunder that are *not* set aside under Section 5021 may not subsequently be used as the basis for a recidivist penalty.[23] Nor is any policy of the Act vio-

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[23] We assume arguendo that if petitioner's YCA conviction had been set aside, he would not have been subject to the recidivist penalty contained in D.C. Code § 22-3204, noting that while there is some disagreement concerning whether Section 5021 requires the physical destruction of the *record* of the prior conviction, the lower courts generally agree that the set-aside provision operates to vacate the conviction, so that it has no further legal effect. See, e.g., *United States* v. *Arrington*, *supra*, 618 F.2d at 1124-1125; *Doe* v. *Webster*, 606 F.2d 1226 (D.C. Cir. 1979); *United States* v. *Purgason*, 565 F.2d 1279, 1280 (4th Cir. 1977); *United States* v. *Doe*, 556 F.2d 391, 392 (6th Cir. 1977); *United States* v. *Fryer*, 545 F.2d 11, 13-14 (6th Cir. 1976);

lated by such use. The Congress that enacted the YCA was greatly concerned with the high rate of recidivism among youthful offenders and intended, by passage of

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United States v. *McMains*, 540 F.2d 387, 389 (8th Cir. 1976); *Mestre Morera* v. *INS*, 462 F.2d 1030, 1032 (1st Cir. 1972); *United States* v. *Henderson*, 482 F. Supp. 234 (D.N.J. 1979); *United States* v. *Hall*, 452 F. Supp. 1008, 1013 (S.D.N.Y. 1977); *State* v. *Pacheco*, 121 Ariz. 88, 91, 588 P.2d 830, 833 (1978); *People* v. *Garcia*, 402 N.Y.S.2d 164, 166-167 (Sup. Ct. 1978). See also *Stevenson* v. *United States*, 380 F.2d 590, 593-594 (D.C. Cir.), cert. denied, 389 U.S. 962 (1967). Cf. *New Banner Institute, Inc.* v. *Dickerson*, 649 F.2d 216, 219-221 (4th Cir. 1981), cert. granted, No. 81-1180 (argued Nov. 29, 1982) (conviction expunged under state law not an appropriate basis for denying firearms license under the Gun Control Act of 1968, 18 U.S.C. 921 *et seq.*).

Nevertheless, we question whether the rehabilitative purposes of the Act are furthered by precluding the use of a set-aside YCA conviction as a basis for a subsequent recidivist penalty (see discussion at page 32, *infra*). Contrary to petitioner's assertions (Br. 21-22), 18 U.S.C. App. 1202(a)(1), which was involved in *Arrington*, *Purgason*, and *Fryer*, is not a recidivist statute. Rather, it is a firearms disability, which, in the absence of set-aside and expungement statutes, would apply to all ex-offenders regardless of their post-conviction conduct. The enhanced penalty provision of D.C. Code § 22-3204, by contrast, is a recidivist statute, which renders an ex-offender liable for harsher penalties only by virtue of his commission of a subsequent offense (see note 5, *supra*). While it is arguable that a set-aside of a conviction should permit the youth offender to enjoy the same rights the rest of the population possesses to bear arms, we can conceive of no reason for protecting him from harsher penalties if he commits a subsequent crime. See Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 Wash. U.L.Q. 147, 160 ("It is not for the confirmed recidivist that primary concern about restoration of status is due, but for the first offender—the 'accidental' criminal, if you will—whose violative conduct never reoccurs"). See also *id.* at 189; Comment, *Expungement of Criminal Convictions Under the Youth Corrections Act: The Need for Revision*, 66 Ky. L.J. 741, 756-757 (1978). Accordingly, even if *Arrington*, *Purgason*, and *Fryer* were decided correctly in this respect, they do not compel the further holding that a set-aside YCA conviction cannot be the basis for a subsequent recidivist penalty. The Court need not resolve that question

the Act, to encourage the successful rehabilitation and reintegration into society of such individuals. *Ralston* v. *Robinson*, 454 U.S. 201, 206 (1981); *Durst* v. *United States*, *supra*, 434 U.S. at 544-545; *Dorszynski* v. *United States*, *supra*, 418 U.S. at 432-433; *id.* at 447-448 (Marshall, J., concurring). To these ends, Congress made available to the youth offender a special program of treatment and supervision, as well as the opportunity, through good behavior, to remove from his record the stigma of conviction. But where the offender has failed to respond to the special treatment afforded by the YCA program, as evidenced by his return to crime, no purpose of the YCA would be served by exempting him from harsher penalties simply because he once appeared to be a candidate for successful rehabilitation.

In view of the foregoing, it is perhaps not surprising that petitioner has cited no case law or other support for the novel proposition that a YCA conviction cannot serve as the basis for a subsequent recidivist penalty. Nor are we aware of any such authority. By contrast, every state court that has been faced with the question has held that YCA convictions not set aside pursuant to Section 5021 are appropriate bases for increased penalties under state second offender statutes. See *State* v. *Cummings*, 607 S.W.2d 685, 688 (Mo. 1980); *State* v. *Pacheco*, 121 Ariz. 88, 89-90, 588 P.2d 830, 832-833

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here, it being a matter of construction of District of Columbia law to be considered on remand in the event petitioner secures a reversal on the set-aside issue that is now before this Court.

The consequences flowing from the grant of a set-aside under Section 5021 are discussed in Comment, *Expungement of Criminal Convictions Under the Youth Corrections Act: The Need for Revision*, *supra*; Comment, *Expungement of Criminal Records Under the Youth Corrections Act*, 62 Iowa L. Rev. 547 (1976); Schaefer, *The Use of Expunged Convictions in Federal Courts*, 35 Fed. B.J. 107 (1976); Schaefer, *The Federal Youth Corrections Act: The Purposes and Uses of Vacating the Conviction*, 39 Fed. Probation 31 (Sept. 1975); and Gough, *supra*.

(1978); *People* v. *Celli*, 430 N.Y.S.2d 949, 952-953 (Westchester County Ct. 1980). Cf. *Lewis* v. *United States*, 445 U.S. 55, 65 (1980); *United States* v. *Brzoticky*, 588 F.2d 773, 775 (10th Cir. 1978); *Barker* v. *United States*, 579 F.2d 1219, 1226 (10th Cir. 1978).

Moreover, although no other federal court of which we are aware has been required to rule on the relationship between the YCA and recidivist statutes, the District of Columbia Circuit has considered the precise interface at issue here—that of the YCA and D.C. Code § 22-3204—and has indicated that it would not accept petitioner's ipse dixit. In *Stevenson* v. *United States*, 380 F.2d 590 (D.C. Cir.), cert. denied, 389 U.S. 962 (1967), in which the court held that a set-aside of a conviction under Section 5021 does not warrant the destruction of fingerprints taken in connection with the conviction (380 F.2d at 593-594), it also noted the salutary consequences that may flow from a set-aside. In particular, the court of appeals distinguished between a YCA conviction that had been set aside and one that had not been for purposes of a subsequent conviction and sentence under D.C. Code § 22-3204:

> For example, under D.C. Code § 22-3204 (1961), a first offender might have a record of conviction of a misdemeanor, only, with imprisonment for not more than one year, but for a second offense under that section he might be sentenced to imprisonment for not more than ten years. * * * Obviously, setting aside a first "conviction" under the Youth Corrections Act can be truly meaningful.

But see note 23, *supra*.

2. The Enhanced Penalty Provision Contained In D.C. Code § 22-3204 (1973) Is Triggered By A Prior YCA Conviction

The relevant language of D.C. Code § 22-3204 (emphasis added) is perfectly clear:

> Whoever violates this section shall be punished as provided in section 22-3215, *unless the violation occurs after he has been convicted* in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years.

As the Court said of similar language contained in 18 U.S.C. App. 1202(a)(1) (*Lewis* v. *United States*, 445 U.S. 55, 60 (1980) (citation omitted)): "No modifier is present, and nothing suggests any restriction on the scope of the term 'convicted.' 'Nothing on the face of the statute suggests a congressional intent to limit its coverage to persons [whose convictions [were not under the YCA]].'" There is thus not even a suggestion in the language of the District of Columbia statute that its enhanced penalty provision was not intended to be triggered by a YCA conviction.

Petitioner asserts (Br. 13-14), however, that "Section 22-3204 of the D.C. Code which penalizes the carrying of concealed weapons was originally enacted in 1932. The drafters of that provision could not have been thinking about the role that FYCA convictions would play in the repeat-offender scheme developed in section 22-3204." But while the portion of Section 22-3204 defining the substantive offense was enacted in 1932 (Act of July 8, 1932, ch. 465, Section 4, 47 Stat. 651), the enhanced penalty provision under which petitioner was sentenced was not added until 1953 (67 Stat. 94), three years after enactment of the YCA and one year after it was made applicable to the District of Columbia (66 Stat. 45). Moreover, the legislative debate on the Act that contained the enhanced penalty provision focused specifically on the relationship between the proposed legislation and the YCA.

The enhanced penalty provision was added to D.C. Code § 22-3204 by the District of Columbia Law En-

forcement Act of 1953, ch. 159, Section 204(c), 67 Stat. 94. In addition to amending Section 22-3204, the 1953 Act also established mandatory minimum sentences for certain crimes committed by a second offender. Section 201(a), 67 Stat. 91-92. As originally drafted, the latter section of both the House and Senate bills included a provision making sentencing under the YCA unavailable to persons subject to the mandatory minimum sentences; moreover, the House bill established minimum sentences for certain crimes even when committed by a first offender. H.R. Rep. No. 514, 83d Cong., 1st Sess. 3-4 (1953); S. Rep. No. 364, 83d Cong., 1st Sess. 3-4 (1953). During debate on the Senate bill, Senator Morse expressed his objection to what he viewed as the bill's "effect of weakening the Youth Corrections Act." 99 Cong. Rec. 6421 (1953). He explained (*ibid.*):

> Before the new Federal Youth Corrections Act can get into operation and be given a chance to prove its value, the Congress is now proposing to scrap it in effect as it applies to the District of Columbia. Under paragraph (d) on page 6 of the bill, the Youth Corrections Act is repealed as it will affect nearly 40 percent of the cases arising in the District of Columbia.
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> * * * * *
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> Now under the proposal a young person 21 years of age and under who is found guilty of housebreaking, for instance, stealing a bottle of whiskey from a liquor store, will even on first offense not be eligible for after-care treatment by the Youth Corrections Board.[24]

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[24] In support of his objections to the bill, Senator Morse offered a letter from Chief Judge Bolitha J. Laws of the District of Columbia, who had been a member of the judicial committee that drafted the original YCA. Judge Laws expressed the same concern for the proposed law's effect on the YCA. 99 Cong. Rec. 6422-6423 (1953).

Senator Barrett attempted to alleviate Senator Morse's concern by pointing out that, under the Senate bill, the mandatory minimum sentence applied only to second offenses. 99 Cong. Rec. 6421 (1953). Nevertheless, the provision prohibiting application of the YCA to defendants who were subject to the mandatory minimum penalties ultimately was stricken. 99 Cong. Rec. 6631-6633 (1953).[25]

It is thus evident that the Congress that enacted the enhanced penalty feature of D.C. Code § 22-3204 was well aware of the existence of the Youth Corrections Act and the implications it would have for sentencing procedures in the District of Columbia. Although the debate focused on the portion of the bill dealing with mandatory sentences, the presence in the same bill of an enhanced penalty for second offenders under D.C. Code § 22-3204 could not have escaped Congress' attention. Congress nevertheless did not exclude YCA convictions from the category of convictions that could trigger the recidivist penalty provision of Section 22-3204. Accordingly, petitioner was correctly sentenced under the enhanced penalty provision on the basis of his prior YCA conviction.

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[25] We note, however, that under current law certain multiple offenders in the District of Columbia are ineligible for sentencing under the YCA, notwithstanding their qualifying age. See D.C. Code § 22-3201(d)(1).

CONCLUSION

The judgment of the District of Columbia Court of Appeals should be affirmed.

Respectfully submitted.

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